

**BEFORE THE DIRECTOR OF THE
DEPARTMENT OF PESTICIDE REGULATION
STATE OF CALIFORNIA**

In the Matter of the Decision of
the Agricultural Commissioner of
the County of San Joaquin
(County File No. 003-ACP-SJ-02/03)

Administrative Docket No. 119

DECISION

**Trinkle Ag Flying, Inc.
2181 N. Tracy Boulevard #212
Tracy, California 95376-2424**

Appellant /

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5 and section 6130 of Title 3, California Code of Regulations (3 CCR), county agricultural commissioners (CACs) may levy a civil penalty up to \$1,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the San Joaquin CAC found that the appellant, Trinkle Ag Flying, Inc. (formerly Trinkle and Boys), violated 3 CCR section 6600(e). The commissioner imposed a total penalty of \$400 for the violation.

Trinkle Ag Flying, Inc., appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation. The Director has jurisdiction over the appeal under FAC section 12999.5.

Standard of Review

The Director decides the appeal on the record before the hearing officer. In reviewing the commissioner's decision, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the hearing officer to support the hearing officer's findings and the commissioner's decision. The Director notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the hearing officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions might also have been reached. In making the substantial evidence determination, the Director draws all reasonable inferences from the information in the record to support the findings, and reviews the record in the light most favorable to the commissioner's decision. If the Director finds substantial evidence in the record to support the commissioner's decision, the Director affirms the decision.

Facts

On March 14 and 15, 2002, the appellant made an aerial application of a pesticide mix, consisting of Kocide 101, Lorsban 4E, and Baythroid 2, to a 25-acre alfalfa field, south and adjacent to a residential property located at 27645 Bird Road. Bird Road runs in a north-south direction. Both the alfalfa field and the residential property front Bird Road. An east-west property line divides the alfalfa field from the residential property.

On March 14, 2002, appellant treated the southern portion of the alfalfa field. On the morning of March 15, 2002, appellant treated the headrow and the portion of the alfalfa field closest to the adjacent residential property, thus completing the aerial application. The wind was calm. No other pesticide applications took place within one-half mile of this area on March 14 and 15, 2002.

On March 15, 2002, a resident of the adjacent residential property reported that three cars on his property were splattered with an opaque blue residue. The resident stated that, on the evening of March 14, 2002, there was no residue on the cars, and that the drift had probably occurred during the morning of March 15, 2002. In response to this complaint, a senior agricultural biologist and a deputy agricultural commissioner from the San Joaquin CAC's office conducted an investigation on the residential property that afternoon. The investigation revealed that three vehicles, located at 40, 100, and 120 feet, respectively, from the property line, had been splattered with an opaque blue residue. The color and texture of the opaque blue residue indicated the presence of Kocide 101. The opaque blue residue was splattered upon the horizontal surfaces of the vehicles, not on the vertical surfaces or the side windows. Also, the San Joaquin CAC's staff observed that the same opaque blue residue that was splattered on the vehicles was present on some scrap wood located about 200-300 feet from the property line.

The San Joaquin CAC's staff collected swab samples from each of the three vehicles located on the residential property adjacent to the alfalfa field. The collected samples were sent to the California Department of Food and Agriculture's (CDFA's) Center for Analytical Chemistry (laboratory) to be analyzed for chlorpyrifos, the active ingredient in Lorsban 4E, which was one of the pesticides used to treat the alfalfa field. The CDFA laboratory's reports showed that each of the samples taken from the three vehicles tested positive for chlorpyrifos (Lorsban). The highest chlorpyrifos level, 43.8 u.g. (micrograms), was found on a vehicle located about 100 feet from the property line. A residue swab sample from a second vehicle, located about 40 feet from the property line, tested positive for chlorpyrifos at 25 u.g. The lowest chlorpyrifos level, 9 u.g., was found on a third vehicle, which was located about 120 feet from the property line. The presence of chlorpyrifos (Lorsban 4E) in the laboratory samples, coupled with the fact that opaque blue residue is consistent with Kocide 101, indicates that the appellant's application caused the pesticide contamination on the

adjacent property.

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Appellant's Allegations

The appellant's main allegations will be summarized and analyzed below.

- The appellant contends that there was no evidence indicating that he caused or could have caused a health effect.

The registered labels in the record for Kocide 101, Lorsban 4E, and Baythroid 2 all warn of various health threats that could result from misuse of the product.

- The appellant contends that the contamination did not rise to the level of "least possible harm," or any other harm other than the resident's need to wash his cars.

The term "Least Possible Harm" refers to a tenet of integrated pest management that relates to using the least harmful, yet effective, pesticide in a given situation. It is not a principle used to justify pesticide contamination.

- The appellant contends that 3 CCR section 6600(e) is unenforceable because it is outside the scope of FAC section 11501.

Regulations exist to implement and make provisions of state law specific. Under FAC section 11501, DPR is mandated to provide for the proper, safe, and efficient use of pesticides, and to protect human health and safety as well as the environment. Clearly, 3 CCR section 6600(e) implements the purpose of DPR as set forth under FAC section 11501(a) and (b).

- The appellant alleges that the findings, evidence, and conclusions are inconsistent with the California Supreme Court ruling in *Topanga Assn. For a Scenic Community v. County of Los Angeles*, 11 Cal.3d 506 (1974).

The *Topanga* case involved a writ of mandamus arising from a Superior Court's ruling regarding an administrative agency's granting of a property variance; the facts surrounding that case are inapplicable here. In the case at hand, a competent hearing officer considered the evidence presented, provided an opportunity for cross-examination, made findings of facts, and rendered a decision based on substantial evidence.

- The appellant contends that there were no offerings of intent or negligence on his part;

therefore, he is not subject to punitive penalties over and above making the complainant “whole.”

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The record provides sufficient evidence to base a finding that the appellant failed to exercise reasonable precautions while performing pest control. That constitutes a violation of a regulation that was designed to implement a statutory mandate to protect human health and the environment from pesticide contamination by providing for civil penalties.

- In addition to mostly irrelevant points and authorities tendered in his “Notice of Appeal and Grounds Therefore,” including those discussed above, the appellant contends that he did not violate 3 CCR section 6600(e) as “there was no evidence proffered to indicate his actions were ‘unreasonable.’”

There was evidence introduced at the hearing to support the conclusion that the appellant failed to exercise reasonable precautions while performing pest control. This will be discussed below.

3 CCR section 6600(e)

In 3 CCR section 6600(e), it states, in relevant part, that each person performing pest control shall exercise reasonable precautions to avoid contamination of the environment.

There is information in the record that supports the finding that, while performing pest control on March 15, 2002, the appellant contaminated three vehicles located on the residential property adjacent to the alfalfa field with an opaque blue residue consisting of Kocide 101, Lorsban 4E, and Baythroid 2. Laboratory tests demonstrated that chlorpyrifos (Lorsban 4E) contamination ranging from 43.8 u.g. to 9 u.g. was detected on the vehicles. There was no other application in the area during the relevant time period. There is no evidence in the record that this contamination could have come from any other source than the appellant’s application.

The appellant testified at the hearing that he made east-west passes, except for headrow passes, maintained a buffer zone of 20-30 feet, and that his equipment did not malfunction. The appellant claimed that some amount of drift is both reasonable and foreseeable. Perhaps, what he meant to say is that drift is unavoidable in certain situations. However, that does not relieve him of the responsibility to exercise reasonable precautions and to use care while performing pest control. The appellant did not introduce any witness testimony or any other evidence which refuted the CAC’s allegation that he violated 3 CCR section 6600(e). Further, the only evidence to support the appellant’s contention that

he duly maintained a 20-30 foot buffer zone between the alfalfa field and the adjacent residential property is his own testimony and the county's repetition of his statements made in the pesticide episode investigation report.

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The fact that the opaque blue residue was splattered directly onto the tops of the vehicles, and not the sides (indicating a vertical fall), as well as the scrap wood, clearly indicates that the appellant failed to establish a sufficient buffer zone, or inadvertently took an action that resulted in contamination of the adjacent residential property. Thus, a reasonable inference from the information in the record is that the appellant failed to exercise reasonable precautions to avoid contamination of the environment during the aerial pesticide application made on March 15, 2002.

Was the Violation Properly Classified as Moderate?

In relevant part, 3 CCR section 6130 provides that moderate violations are repeat minor violations, or violations which posed a reasonable possibility of creating a health or environmental effect.

The registered label information in the record for Kocide 101 reads: "Corrosive. Causes irreversible eye damage. Harmful if swallowed, absorbed through the skin or inhaled. May cause skin sensitization reactions in certain individuals. Avoid contact with the skin, eyes, or clothing. Avoid breathing dust." Under the Agricultural Use Requirements, the registered Kocide 101 label prevents worker entry into treated areas for seven days, and includes warning workers against contacting residues and subsequent eye rubbing.

The registered Lorsban 4E label reads: "May be fatal if swallowed. Harmful if absorbed through skin. Causes substantial but temporary eye injury. Causes skin irritation. Lorsban 4E-HF may cause skin sensitization reactions in certain individuals."

The registered Baythroid 2 label reads: "Danger: Causes eye damage. May be fatal if inhaled. Harmful if swallowed or absorbed through the skin. Do not get into eyes, on skin, or in clothing."

In this case, it was foreseeable that one of the residents of the adjacent residential property might have contact with one of the contaminated vehicle surfaces in order to gain entry into one of the vehicles. A reasonable inference from the information in the record is that the violation posed a reasonable possibility of creating a health effect. Therefore, this violation is properly classified as moderate.

Conclusion

The record shows the commissioner's decision is supported by substantial evidence; therefore, there is no cause to reverse or modify the decision.

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Disposition

The commissioner's decision is affirmed. The commissioner shall notify the appellant how and when to pay the \$400 fine.

Judicial Review

Under FAC section 12999.5, the appellant may seek court review of the Director's decision within 30 days of the date of the decision. The appellant must file a petition for writ of mandate with the court and bring the action under Code of Civil Procedure section 1094.5.

STATE OF CALIFORNIA
DEPARTMENT OF PESTICIDE REGULATION

By: _____ Dated: June 3, 2004
Paul Helliker
Director